

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

TRAVELERS CASUALTY AND SURETY COMPANY as
Administrator for RELIANCE INSURANCE COMPANY,

Plaintiff,

vs.

DORMITORY AUTHORITY – STATE OF NEW YORK,
TDX CONSTRUCTION CORP. and KOHN PEDERSEN
FOX ASSOCIATES, P.C.,

Defendants.

DORMITORY AUTHORITY OF THE STATE OF NEW YORK
AND TDX CONSTRUCTION CORP.,

Third-Party Plaintiffs,

vs.

TRATAROS CONSTRUCTION, INC.,

Third-Party Defendant.

TRATAROS CONSTRUCTION, INC. and TRAVELERS
CASUALTY AND SURETY COMPANY,

Fourth-Party Plaintiffs,

vs.

CAROLINA CASUALTY INSURANCE COMPANY; BARTEC
INDUSTRIES, INC.; DAYTON SUPERIOR SPECIALTY
CHEMICAL CORP. a/k/a DAYTON SUPERIOR CORPORATION;
SPECIALTY CONSTRUCTION BRANDS, INC. t/a TEC;
KEMPER CASUALTY INSURANCE COMPANY d/b/a KEMPER;
INSURANCE COMPANY; GREAT AMERICAN INSURANCE
COMPANY; NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA; UNITED STATES FIRE
INSURANCE COMPANY; ALLIED WORLD ASSURANCE
COMPANY (U.S.) INC. f/k/a COMMERCIAL UNDERWRITERS :

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: 07-CV-6915 (DLC)
: **ECF CASE**

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:
: **ANSWER OF**
: **LUMBERMENS**
: **MUTUAL CASUALTY**
: **COMPANY improperly**
: **sued as KEMPER**
: **CASUALTY**
: **INSURANCE**
: **COMPANY d/b/a**
: **KEMPER**
: **INSURANCE**
: **COMPANY TO**
: **CROSS-CLAIM OF**
: **COSENTINI**
: **ASSOCIATES, INC.**

INSURANCE COMPANY; ZURICH AMERICAN INSURANCE' :
 COMPANY d/b/a ZURICH INSURANCE COMPANY; OHIO :
 CASUALTY INSURANCE COMPANY d/b/a OHIO CASUALTY :
 GROUP; HARLEYSVILLE MUTUAL INSURANCE COMPANY :
 (a/k/a HARLEYSVILLE INSURANCE COMPANY); JOHN DOES :
 1-20 and XYZ CORPS. 1-20, :
 :
 :
 _____ Fourth-Party Defendants. :

Comes now Fourth-Party Defendant Lumbermens Mutual Casualty Company (“LMC”), improperly sued as Kemper Casualty Insurance Company d/b/a Kemper Insurance Company,¹ and for its Answer to the Cross-Claim of Third-Party Defendant Cosentini Associates, Inc. (“Cosentini”) states as follows:

46. LMC denies that Fourth-Party Plaintiffs sustained any damages as alleged in the Fourth-Party Complaint. LMC also denies that it engaged in, and/or provided any, culpable conduct, acts or omissions, negligence, strict products liability, statutory violation, breach of contract, obligation or warranty regarding the allegations in the Complaint and Third-Party Complaint.

47. LMC denies that Cosentini is entitled to indemnification or contribution from, and to have judgment against LMC for any verdict or judgment, or any portion thereof, that any other party may recover against Cosentini.

WHEREFORE, LMC prays that this Court enter judgment against Cross-Claimant Cosentini as to all of its claims against LMC in the Cross-Claim of Cosentini, including that Cosentini is not entitled to indemnification or contribution from LMC for all or any part of any verdict or judgment that any other party may recover against Cosentini and that this Court grant LMC its attorneys’ fees and costs incurred in defending against this Cross-Claim, and such other relief that this Court deems just and equitable.

Affirmative Defenses

**FIRST AFFIRMATIVE DEFENSE
(Trataros is Not an Insured)**

Cosentini is not entitled to indemnification or contribution from, or to have judgment entered against, LMC because Trataros Construction, Inc. (“Trataros”) is not a named insured in LMC Policy No. 4LS 001759-00 at issue and Trataros is therefore not entitled to a defense or indemnification from LMC.

**SECOND AFFIRMATIVE DEFENSE
(Trataros is Not an Additional Insured for Claims at Issue)**

LMC Policy No. 4LS 001759-00 at issue provides additional insured status where the Named Insured G.M. Crocetti, Inc. (“Crocetti”) is required to provide insurance in a contract but only for liability arising from the named insured Crocetti’s work for that party. Any liability of Trataros is the result of Trataros’ conduct in insisting that Crocetti install terrazzo over Conflow over Crocetti’s objections. Any liability of Trataros does not arise out of Crocetti’s work but arises out of Trataros’ decisions. Trataros is therefore not an additional insured under the LMC Policy for the Terrazzo claims and Cosentini is therefore not entitled to indemnification or contribution from, or to have any judgment entered against, LMC.

**THIRD AFFIRMATIVE DEFENSE
(Lack of Occurrence)**

LMC Policy No. 4LS 001759-00 at issue requires that a covered claim arise out of an “occurrence”. Trataros ordered Crocetti, over Crocetti’s objections, to install terrazzo flooring over Conflow, knowing that it would fail. As such, the claim does not constitute an “occurrence” and

¹ LMC is one of the Kemper Insurance Companies, and issued the insurance policy at issue in the Fourth-Party

there is no duty to defend or indemnify Trataros under the LMC Policy and Cosentini is therefore not entitled to indemnification or contribution from, or to have any judgment entered against, LMC.

**FOURTH AFFIRMATIVE DEFENSE
(Your Work Exclusion Bars Any Coverage)**

LMC Policy No. 4LS 001759-00 at issue contains an Exclusion titled “Your Work” which excludes coverage for any property damage that results from the work conducted by the insured and/or additional insured. If Trataros qualifies as an additional insured under the LMC Policy, which LMC denies, there is no coverage for any claim by Trataros against LMC and Cosentini is not entitled to indemnification or contribution from, or to have any judgment entered against, LMC.

**FIFTH AFFIRMATIVE DEFENSE
(Failure to Provide Proper Notice)**

LMC Policy No. 4LS 001759-00 at issue contains a notice condition that requires notification of an occurrence as soon as practicable and immediate notification of an offense that may result in a claim. The notice condition also requires immediate notice of a claim or suit. If Trataros qualifies as an additional insured under the LMC Policy, which LMC denies, Trataros failed to comply with this condition and therefore there is no duty to defend or indemnify Trataros under the LMC Policy, and Cosentini is therefore not entitled to indemnification or contribution from, or to have judgment entered against, LMC.

**SIXTH AFFIRMATIVE DEFENSE
(Other Insurance)**

LMC Policy No. 4LS 001759-00 at issue contains provisions that provide that if there is any other collectible insurance available to an insured, the LMC Policy will be excess of the other collectible insurance.

Cosentini's claims are barred in whole or in part to the extent that there is other collectible insurance available to the insured.

**SEVENTH AFFIRMATIVE DEFENSE
(Failure to State a Claim)**

The Cross-Claim fails to allege facts sufficient to constitute a claim against LMC.

**EIGHTH AFFIRMATIVE DEFENSE
(Failure to Properly Allege Indemnification)**

The Cross-Claimant does not satisfy all elements to properly allege indemnification against LMC.

**NINTH AFFIRMATIVE DEFENSE
(Failure to Properly Allege Contribution)**

The Cross-Claimant does not satisfy all elements to properly allege contribution against LMC.

**TENTH AFFIRMATIVE DEFENSE
(Other Defenses)**

LMC reserves the right to amend its Answer by way of adding affirmative defenses, counterclaims, cross-claims, or by instituting third party actions as additional facts are obtained through investigation and discovery.

WHEREFORE, LMC prays that Cross-Claimant take nothing by its Cross-Claim; that LMC be dismissed with prejudice and awarded fees and costs incurred in defending this Cross-Claim; and

that this Court enter a declaration that LMC is not obligated to provide insurance coverage for Cross-Claimant or any other party, and for any further relief that this Court deems equitable and just.

DATED: April 4, 2008

**TOMPKINS, McGUIRE, WACHENFELD &
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By: s/ Michael S. Miller
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DECLARATION OF SERVICE

The undersigned hereby declares, under penalty of perjury, that on April 4, 2008, he caused a true copy of the foregoing Answer, etc. to be served via electronic filing upon counsel for the various parties as follows:

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